

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

JOSE VALDIVIA,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

CIVIL 13-1439 (DRD)
(CRIMINAL 03-0331 (DRD))

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
DENYING PETITIONER'S MOTION UNDER 28 U.S.C. § 2255

PREFACE

As a preface to my proposed findings to the court, and after having reviewed at length the multi-faceted argument of petitioner, with attached exhibits, including affidavits, the response of the United States, the trial court docket, decision of the court of appeals, and this year's Alleyne decision¹, it is clear to me that petitioner was zealously represented by retained trial counsel, court-appointed appellate counsel, and jail house counsel. As to the two former attorneys, the question before the court is whether such zeal as apparent from the docket and court opinions translates into adequate representation under the Sixth Amendment. Considering the extraordinary nature of the writ petition seeks from this court, it is difficult to conclude that petitioner's right to effective legal representation, a right to which he was

¹Alleyne v. United States, 133 S.Ct. 2151 (2013), decided June 17, 2013.

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3 entitled at trial and on appeal, was violated by the attorneys whose
4 professional performance he vigorously attacks in the pleadings before the
5 court.
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7 I. INTRODUCTION

8 Petitioner was indicted on November 21, 2003 in both counts of a two-count
9 indictment. (Crim. No. 03-331, Docket No. 7.) Carlos J. Pabon was also indicted.
10 Petitioner was charged in the first count in that, from on about October 1, 2001
11 up to April 30, 2003, in the District of Puerto Rico and elsewhere within the
12 jurisdiction of this court, both defendants did knowingly, willfully, intentionally,
13 and unlawfully conspire, confederate, and agree together and with diverse other
14 persons to the Grand Jury known and unknown, to commit an offense against the
15 United States, that is, to possess with intent to distribute one kilogram or more
16 of heroin, a Schedule I Narcotic Drug Controlled Substance, all in violation of Title
17 21, United States Code, Section 841(a)(1). All in violation of 21 U.S.C. § 846.
18 (Criminal 03-331, Docket No. 7). Counts Two charges that from on about
19 October 1, 2001 up to April 30, 2003, in the District of Puerto Rico and elsewhere
20 within the jurisdiction of this court, both defendants did willfully, knowingly,
21 intentionally, and unlawfully conspire, confederate, and agree together and with
22 diverse other persons to the Grand Jury known and unknown, to commit an
23 offense against the United States, that is, to import into the United States, from
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3 a place outside thereof, to wit: Aruba, one (1) kilogram or more of heroin, a
4 Schedule I Narcotic Drug Controlled Substance, all in violation of Title 21, United
5 States Code, Section 952(a). All in violation of Title 21, United States Code,
6 Section 963.
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8 Court-appointed counsel Juan M. Masini-Soler was assigned to represent
9 petitioner on November 24, 2003. (Criminal 03-331, Docket No. 11). Attorney
10 Lixandra Osorio-Felix filed a notice of appearance on the following day when
11 petitioner was arraigned and entered a not guilty plea. Attorney Masini-Soler was
12 then relieved of representation. Defense counsel filed a flurry of disclosure
13 motions on December 1, 2003. (Criminal 03-331, Docket Nos. 17-23). Attorney
14 Nicolas Noguerras filed a notice of appearance on December 10, 2003. (Criminal
15 03-331, Docket No. 29). A motion for bill of particulars was filed on March 10,
16 2004. (Criminal 03-331, Docket No. 45). An emergency motion for discovery and
17 inspection was also filed on that date. (Criminal 03-331, Docket No. 47). Defense
18 counsel also sought a meeting with two Task Force agents. (Criminal 03-331,
19 Docket No. 48).
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23 On March 28, 2005, petitioner moved to dismiss the indictment. (Criminal
24 03-331, Docket No. 91). The motion was denied. Petitioner filed another series
25 of motions on June 3, 6, 9 and 10, 2005. (Criminal 03-331, Docket Nos. 98-103,
26 111-16, 118-19). Another motion to dismiss was filed on July 15, 2005. (Criminal
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3 03-331, Docket No. 129). A motion to dismiss based upon a violation of the right
4 to speedy trial was filed January 31, 2006. (Criminal 03-331, Docket No. 154).
5 Another motion to dismiss was filed on February 2, 2006. (Criminal 03-331,
6 Docket No. 156). Suppression motions were also filed. (Criminal 03-331, Docket
7 Nos. 100, 102, 103, 118, 125). During the pretrial period, numerous conferences
8 were held with the court. (Criminal 03-331, Docket Nos. 72, 76, 82, 87). Two
9 interlocutory appeals were also filed.
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12 Trial began on February 6, 2006 and ended on February 23, 2006 with a
13 verdict of guilty. (Criminal 03-331, Docket No. 186). Attorney Laura Maldonado
14 joined the legal representation on March 2, 2006 and both attorneys Nicolas
15 Noguerras and Lixandra Osorio-Felix moved to withdraw legal representation on
16 March 7 and 9, 2006. (Criminal 03-331, Docket Nos. 194, 196). Attorney Rachel
17 Brill was appointed to represent petitioner on June 22, 2007. (Criminal 03-331,
18 Docket No. 240). After numerous delays and settings, sentencing was finally held
19 on March 28, 2008. (Criminal 03-331, Docket No. 255). Court-appointed counsel
20 filed a comprehensive sentencing memorandum urging imposition of the statutory
21 minimum. (Criminal 03-331, Docket No. 254). Petitioner was sentenced to 210
22 months imprisonment. A notice of appeal was filed on March 31, 2008. (Criminal
23 03-331, Docket No. 259.) On May 16, 2012, the United States Court of Appeals
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3 for the First Circuit affirmed the conviction in a lengthy opinion. United States v.
4 Valdivia, 680 F.3d 33 (1st Cir. 2012).
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6 The court of appeals addressed what it described as a litany of alleged errors
7 by the district court, such as the denial of a motion to dismiss for speedy trial
8 violations (The Speedy Trial Act), inappropriate comments and misleading jury
9 instructions, witness bolstering, the district court's allowing inadmissible hearsay
10 and overview testimony, allowing a fact witness to testify as an expert², denying
11 multiple requests to suppress Aruban wiretap evidence, and improperly applying
12 the sentencing guidelines during the sentencing hearing. United States v.
13 Valdivia, 680 F.3d at 37.
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16 The district court ultimately held petitioner personally responsible for thirty
17 kilograms of heroin and found that he had exercised managerial authority over
18 another participant in the criminal activity. He argued on appeal that the sentence
19 was excessive but the appellate court noted that ultimately an advisory guideline
20 range of 292-365 months was provided for and the sentencing court departed
21 significantly in sentencing petitioner to a term of 210 months. United States v.
22 Valdivia, 680 F.3d at 53.
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27 ²This was subject of a concurring opinion. United States v. Valdivia, 680
28 F3d at 56-61.

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4 Finally, the appellate court noted that there were no reversible errors,
5 cumulative or otherwise. United States v. Valdivia, 680 F.3d at 55. A petition
6 for a writ of certiorari was denied. Valdivia v. United States, 133 S.Ct. 565 (2012).

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8 II. MOTION UNDER 28 U.S.C. § 2255

9 This matter is before the court on petitioner's motion to vacate, set aside or
10 correct his sentence under 28 U.S.C. § 2255, filed on June 7, 2013. (Docket No.
11 1.) Petitioner argues that he was denied effective assistance of trial counsel due
12 to numerous errors in the proceedings, errors also caused by the prosecutor, the
13 trial judge and the court interpreter. He specifically argues that the Jones Act was
14 violated because of the faulty procedure used with transcripts of foreign wiretaps.
15 Because of the irregularities and errors, the Aruban wiretaps were arguably
16 tainted. Thrown into this category of error is the court's failure to give jury
17 instructions defining reasonable doubt, circumstantial evidence, and reasonable
18 foreseeable. Petitioner also attacks the sufficiency of the voir dire of the venire
19 persons as it relates to their fluency in the English language (Docket No. 1-1 at 4).
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22 Petitioner's second argument is that the trial judge was unfair to the
23 defense, such as having the jury listen to evidence in the absence of the
24 defendant, and made insulting remarks to defense counsel, as well making remarks
25 in Spanish to the jury. The trial judge is also charged with rushing the trial to a
26 close. The third issue is actually directed to defense counsel and not so much to
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3 the court, although petitioner attacks defense counsel's failing to object to the
4 judge's remarks and faulty jury instructions, thus resulting in an unreasonable
5 sentence.
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7 Petitioner argues that appellate counsel was ineffective in not challenging the
8 jury instructions. He attributes to appellate counsel a fatal ineffectiveness for not
9 raising all of the points that are now being raised. Finally, petitioner argues that
10 defense counsel Noguerras utilized family members to convince him not to testify
11 on his own behalf. He asks for an evidentiary hearing and the appointment of
12 counsel. Petitioner includes an affidavit by his wife Ileana Rodriguez Perez in
13 relation to conversations had with family members and attorney Noguerras, and the
14 pressure counsel Noguerras asserted on her and family members in convincing
15 petitioner not to testify at trial. (Docket No. 3-1). He also includes his own
16 affidavit denying the factual and legal basis for his conviction, his lack of
17 participation in any group that imported heroin, his lack of supervisory role in such
18 a group, and his failure to have given to Jeffrey Scott Grueninger, a cooperating
19 co-conspirator and trial witness, any consideration for controlled substances.
20 (Docket No. 1-2). Petitioner includes excerpts of the trial transcript including part
21 of the court's final jury instructions on reasonable doubt (Docket No. 1-3 at 4-5).
22 Petitioner also provides excerpts on which he relies to reflect to bias of the trial
23 judge, such as wanting to finish the case, the Jones Act issue, proceedings held
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3 outside the presence of the jury, corrections or amendments of the tape
4 transcripts and the prosecutor arguing in the Spanish language. (Docket No. 1-3).
5 He asks over and over for an evidentiary hearing to further develop the arguments
6 and ultimately dismissal of the charges with prejudice based upon the invited
7 structural errors which permeate the record. (Docket No. 1 at 10-11).
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10 The government filed a response in opposition to petitioner's motion on July
11 1, 2013. (Docket No. 5). It argues that there was no violation of the Jones Act,
12 48 U.S.C. § 864, but also that petitioner's collateral attack is generally
13 undeveloped and where not undeveloped has been considered and decided at trial
14 and again on appeal. As to the wiretap evidence admission, the government notes
15 that the argument is another motion to suppress evidence cloaked as a collateral
16 challenge. The government goes into detail regarding the method used by the
17 district in reviewing and correcting the wiretap transcript translations. See United
18 States v. Morales-Madera, 352 F.3d 1 (1st Cir. 2003). The government argues
19 that petitioner presents no factual predicate for attacking the voir dire procedure
20 used by the court. It further points out the erroneous argument by quoting parts
21 of the transcript where defense counsel Nogueras questions the fluency of one of
22 the veniremen. Petitioner also argues that the prosecutor, Assistant United States
23 Attorney Warren Vazquez, addressed the jurors in Spanish during the closing
24 argument, thus violating the Jones Act, and notes that in context there was no
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3 reversible error. See United States v. Rivera-Rosario, 300 F.3d 1, 10 (1st Cir.
4 2002).

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6 On August 13, 2013, petitioner filed a reply to the government's response.
7 (Docket No. 10.) He prefixes his reply by reminding the court that because he
8 appears pro se, his pleadings are considered more liberally, however inartfully or
9 opaquely pleaded, than those penned and filed by an attorney. See Erickson v.
10 Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197 (2007). He asks the court's indulgence
11 in relation to such factors as confusion of legal theories, poor syntax, sentence
12 construction and lack of familiarity with pleadings. Certainly, judges are to hold
13 pro se complaints "to less stringent standards than formal pleadings drafted by
14 lawyers." Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594 (1972). Petitioner's
15 pleadings, however, are sophisticated and written as though created by a lawyer.
16 Nevertheless, the general concepts of relaxed stringency apply.
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20 Petitioner also replies that if has not fully developed his claim, a Certificate
21 of Appealability should issue at either the trial level or appellate level. (Docket No.
22 10 at 2). Upon reply, petitioner stresses that the court should apply the holding
23 in the recent Supreme Court case, Alleyne v. United States, 133 S.Ct. 2151
24 (2013) to this case and apply a plain error standard to the failure of the court to
25 have instructed the jury to find petitioner responsible for a specific drug quantity
26 beyond a reasonable doubt. He also argues that Alleyne is applicable to cases on
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3 direct appellate review because Alleyne applies the holding of Apprendi v. New
4 Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000). See United States v. Colon-Solis,
5 354 F.3d 101 (1st Cir. 2004). He extends this argument to stress that the holding
6 of Alleyne is applicable to cases on collateral review, pointing out that such a
7 finding of retroactive effect follows "as night follows day". Docket No. 10 at 4.
8 Petitioner again stresses his entitlement to an evidentiary hearing. Specifically, he
9 notes that defense attorney Noguerras had the wiretap translations in his
10 possession for two years and did not correct them with the help of his own expert.
11 Petitioner stresses the violations of the procedures outlined in United States v.
12 Morales-Madera, *supra*.

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16 Petitioner repeats much of the argument of his motion, such as error in the
17 court's failing to define reasonable doubt. (Docket No. 10 at 7-8). Petitioner
18 concludes the reply by attacking the trial judge as to his ethics, and trial and
19 appellate counsel as to their defective performances, adding that he was denied
20 the right to testify after telling his lawyer that he wanted to testify. (Docket No.
21 10 at 10).

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23 Having considered the arguments of the parties and for the reasons set forth
24 below, I recommend that petitioner Valdivia's motion to vacate, set aside, or
25 correct sentence be DENIED without an evidentiary hearing. I explain.

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27 II. DISCUSSION
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4 Under section 28 U.S.C. § 2255, a federal prisoner may move for post
5 conviction relief if:

6 the sentence was imposed in violation of the Constitution
7 or laws of the United States, or that the court was without
8 jurisdiction to impose such sentence, or that the sentence
9 was in excess of the maximum authorized by law, or is
10 otherwise subject to collateral attack. . . .

11 28 U.S.C. § 2255(a); Hill v. United States, 368 U.S. 424, 426-27 n.3, 82 S.Ct. 468
12 (1962); David v. United States, 134 F.3d 470, 474 (1st Cir. 1998). The burden
13 is on the petitioner to show his entitlement to relief under section 2255, David v.
14 United States, 134 F.3d at 474, including his entitlement to an evidentiary hearing.
15 Cody v. United States, 249 F.3d 47, 54 (1st Cir. 2001) (quoting United States v.
16 McGill, 11 F.3d 223, 225 (1st Cir. 1993)). It has been held that an evidentiary
17 hearing is not necessary if the 2255 motion is inadequate on its face or if, even
18 though facially adequate, "is conclusively refuted as to the alleged facts by the files
19 and records of the case." United States v. McGill, 11 F.3d at 226 (quoting Moran
20 v. Hogan, 494 F.2d 1220, 1222 (1st Cir. 1974)). "In other words, a '§ 2255
21 motion may be denied without a hearing as to those allegations which, if accepted
22 as true, entitle the movant to no relief, or which need not be accepted as true
23 because they state conclusions instead of facts, contradict the record, or are
24 'inherently incredible.'" United States v. McGill, 11 F.3d at 226 (quoting Shraiar
25 v. United States, 736 F.2d 817, 818 (1st Cir. 1984)).
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4 Collateral attack on non constitutional and non jurisdictional "claims are
5 properly brought under section 2255 only if the claimed error is 'a fundamental
6 defect which inherently results in a complete miscarriage of justice' or 'an omission
7 inconsistent with the rudimentary demands of fair procedure.'" Knight v. United
8 States, 37 F.3d 769, 772 (1st Cir. 1994) (quoting Hill v. United States, 368 U.S.
9 at 428, 82 S.Ct. 468). A claim of ineffective assistance of counsel is one such
10 constitutional violation that may be raised by way of a section 2255 motion. See
11 United States v. Kayne, 90 F.3d 7, 14 (1st Cir. 1996).

12
13 INEFFECTIVE ASSISTANCE OF COUNSEL

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15 "In all criminal prosecutions, the accused shall enjoy the right to . . . the
16 Assistance of Counsel for his defence." U.S. Const. amend. 6. To establish a claim
17 of ineffective assistance of counsel, a petitioner "must show that counsel's
18 performance was deficient," and that the deficiency prejudiced the petitioner.
19 Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). "[T]he
20 'Sixth Amendment guarantees reasonable competence, not perfect advocacy
21 judged with the benefit of hindsight.'" Sleeper v. Spencer, 510 F.3d 32, 38 (1st
22 Cir. 2007) (quoting Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1 (2003)). The
23 two part test for constitutionally ineffective assistance of counsel was set forth in
24 the Strickland case. Strickland v. Washington, 466 U.S. at 687, 104 S. Ct. 2052;
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26 see also Smullen v. United States, 94 F.3d 20, 23 (1st Cir. 1996); Knight v. United
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3 States, 37 F.3d at 774. The petitioner "must show that 'counsel's representation
4 fell below an objective standard of reasonableness,' and that 'the deficient
5 performance prejudiced his defense.'" Owens v. United States, 483 F.3d 48, 63
6 (1st Cir. 2007) (quoting Strickland v. Washington, 466 U.S. at 687-88, 104 S. Ct.
7 2052); see Cruz v. Municipality of Dorado, 780 F. Supp. 2d 157, 159 (D.P.R.
8 2011). The defendant bears the burden of proof for both elements of the test.
9 See Cirilo-Muñoz v. United States, 404 F.3d 527, 530 (1st Cir. 2005) (citing Scarpa
10 v. Dubois, 38 F.3d 1, 8-9 (1st Cir. 1994)).

11 "[J]udicial scrutiny of counsel's performance must be highly deferential,' and
12 'every effort [should] be made to eliminate the distorting effects of hindsight.'" Argencourt v. United States, 78 F.3d 14, 16 (1st Cir. 1996) (quoting Strickland
13 v. Washington, 466 U.S. at 689, 104 S. Ct. 2052); see United States v. Valerio,
14 676 F.3d 237, 246 (1st Cir. 2012). The test includes a "strong presumption that
15 counsel's conduct falls within the wide range of reasonable professional
16 assistance." Smullen v. United States, 94 F.3d at 23 (quoting Strickland v.
17 Washington, 466 U.S. at 689, 104 S. Ct. 2052).

18 The second element of the Strickland test "also presents a high hurdle. 'An
19 error by counsel, even if professionally unreasonable, does not warrant setting
20 aside the judgment of a criminal proceeding if the error had no effect on the
21 judgment.'" Argencourt v. United States, 78 F.3d at 16 (quoting Strickland v.
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3 Washington, 466 U.S. at 691, 104 S. Ct. 2052). There must exist a reasonable
4 probability that, "but for counsel's unprofessional errors, the result of the
5 proceeding would have been different." Dugas v. Coplan, 428 F.3d 317, 334 (1st
6 Cir. 2005) (quoting Strickland v. Washington, 466 U.S. at 694, 104 S. Ct. 2052).
7 "[A] reasonable probability is one 'sufficient to undermine confidence in the
8 outcome.'" González-Soberal v. United States, 244 F.3d 273, 278 (1st Cir. 2001)
9 (quoting Strickland v. Washington, 466 U.S. at 694, 104 S. Ct. 2052).
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12 III. TRIAL COUNSEL

13 Petitioner argues that defense counsel Noguerras performed in a
14 constitutionally defective manner, thus violating his Sixth Amendment right to
15 counsel. The docket of the case, as well as a summary of counsel's performance
16 in the appellate opinion belie the accusation. None of the errors considered by the
17 appellate court, beginning with the waiver of the Speedy Trial argument, resulted
18 in plain error. Regardless of whether trial counsel preserved the issues for appeal,
19 such as the trial judge's arguably prejudicial comments and posture relating to the
20 voice identification of the defendant on certain wiretap recordings, the appellate
21 court concluded, after a painstaking review of the trial record, that the judge's
22 actions did not amount to reversible error. United States v. Valdivia, 680 F.3d at
23 43. I consider a list of the issues raised by petitioner as to the shortcomings his
24 attorney suffered during the trial proceedings.
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4 A. ARUBAN WIRETAP TRANSLATIONS

5 Petitioner protests the method in which the translation process was carried
6 out during and before trial, including the court's providing its own translation of
7 different parts of the wire transcripts. The translations were in the possession of
8 defense counsel two years before trial, certainly adequate time to prepare for trial.

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10 See United States v. Bravo-Fernandez, 792 F. Supp. 2d 172, 175 (D.P.R. 2011).

11 There was certainly much disagreement among the parties as to the accuracy of
12 the translations and therefore accuracy of the transcripts. Under these
13 circumstances, ". . .it is advisable for the district court to try to obtain a stipulated
14 transcript from the parties before trial or, at least, before a transcript is used.

15 Failing such stipulation, each party should be allowed to introduce its own
16 transcript of the recording provided that it is properly authenticated". United
17 States v. Morales-Madera, 352 F.2d at 8.

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19 "In the case of tapes of non-English conversations . . .[i]f the parties
20 do not agree that the English transcript submitted is correctly
21 translated, the preferred solution is to obtain agreement from counsel
22 as to an accurate translation. If agreement is not possible, the district
23 court should have the parties present testimony from translators and
24 allow the jury to decide the issue. See Weinstein & Berger, Weinstein's
25 Federal Evidence § 901.09."

26 Id.

27 The trial court took pains to assure that the transcripts and translations were
28 accurate under the normal pressure associated with trial. This was clearly done

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3 outside the presence of the jury. Case law provides guidelines for courts to follow
4 and this court is no stranger to issues with transcripts and translations since such
5 are the rule and not the exception in this district. It is clear that the United States
6 complied with its obligation to provide transcripts and translations to petitioner in
7 sufficient time to prepare for trial. That defense counsel waited for trial to attack
8 the accuracy of the production does not trigger a conclusion of inefficacy.
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10 Considering the nature of the numerous motions that were filed and made orally,
11 the issue could very well have been left for trial although better resolved
12 beforehand. Nevertheless, there was a general agreement on how to resolve the
13 issue at trial. It is again difficult to conclude that resolution of the translation
14 dilemma triggered a Sixth Amendment violation, particularly when the court found
15 a reasonable and agreeable solution to the problem after defense counsel
16 registered late but meaningful protest.
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19 B. APPLICABILITY OF ALLEYNE TO DRUG QUANTITIES
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21 Petitioner's reply brief argument related to Alleyne stresses that the jury did
22 not consider the drug amount he was attributed, but the verdict form clearly
23 provided the jury with the statutorily provided range of ten years to life by asking
24 the jury if petitioner was held accountable for one kilogram or more of heroin. See
25 21 U.S.C. § 841(b)(1)(A)(I). (Criminal No. 03-331, Docket No. 186). The judge
26 instructed the jury to make a specific finding as to the quantity of heroin
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attributable to him. (Docket No. 1-3 at 120-21). The judge later made particularized findings by a preponderance of the evidence. United States v. Valdivia, 680 F.3d at 52-54; See United States v. Rodriguez, 731 F.3d 20, 31 (1st Cir. 2013), citing United States v. Acosta-Colon, ___ F.3d ___, 2013 WL 6654386 (Dec. 18, 2013) at *18. Furthermore, notwithstanding petitioner's argument that night follows day, and that Alleyne applies to this case, Alleyne has not been made retroactive to cases on collateral review.³ That is clear from the decision itself and the case law among the circuits holding that Alleyne does not apply to cases on collateral review. In re Kemper, 735 F.3d 211, 212 (5th Cir. 2013); United States v. Redd, 735 F.3d 88, 91 (2d Cir. 2013); In re Payne, 733 F.3d 1027, 1029-30 (10th Cir. 2013); Simpson v. United States, 721 F.3d 875, 876 (7th Cir. 2013); cf. United States v. Doe, ___ F.3d ___, ___, 2013 WL 6697824 (December 20, 2013) at *12-*14.

C. RIGHT TO TESTIFY

Petitioner has a "'...fundamental constitutional' right to testify in his own defense, Rock v. Arkansas, 483 U.S. 44, 51-53, 107 S.Ct. 2704 (1987), and that ...right must be 'unfettered.'" Harris v. New York, 401 U.S. 222, 230, 91 S.Ct. 643 (1971); Owens v. United States, 483 F.3d at 58; see Rosenthal v. O'Brien, 713 F.3d 676, 687 (1st Cir. 2013). Petitioner was aware of his right to testify, as

³Petitioner's motion was filed ten days prior to the Supreme Court's handing down the Alleyne decision.

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3 is clear from his affidavit and that of his spouse, Ileana Rodriguez Perez, who was
4 told by attorney Noguerras, emphatically and repeatedly, to pressure petitioner
5 into not testifying, to "forget about 'sitting' as his own witness in trial..." (Docket
6 No. 3-1 at 1, ¶ 3). Petitioner attests: "Mr. Nicolas Noguerras, did everything in his
7 power to stop me from testifying in my own behalf at trial. Including going to my
8 sister, wife and other family members to have them persuade me not to testify at
9 trial in my own behalf. I still to this day desire to testify at any re-trial I may
10 have." (Docket No. 1-2 at 1, ¶ 3). Petitioner notes that he wanted to testify and
11 deny any connection with any nefarious enterprise. That did not happen because
12 he and his family were pressured into having him not testify. Succumbing to that
13 pressure, as related by Ileana Rodriguez Perez, petitioner decided not to testify.
14 Conclusively, petitioner was aware of his right to testify, the district court was not
15 aware of any polemic between defense counsel and petitioner, and ultimately,
16 albeit under pressure from family members and counsel, petitioner decided not to
17 testify. Cf. Siciliano v. Vose, 834 F.2d 29, 30-31 (1st Cir. 1987). If one compares
18 the conclusory statements of petitioner with the evidence presented at trial,
19 including incriminating recordings of petitioner's voice⁴, it is not hard to conclude
20 the advice of defense counsel was reasonable under the circumstances. See e.g.
21 Tormes-Ortiz v. United States, 472 F. Supp. 2d 122, 126 (D.P.R. 2006); Ovalle

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28 ⁴See United States v. Valdivia, 680 F.3d at 44-45.

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3 Marquez v. United States, 258 F. Supp. 2d 7, 13 (D.P.R. 2003). Assuming
4 petitioner's knowledge of the right to testify, whether he testified or not under the
5 circumstances was primarily a matter of trial strategy to be decided between the
6 defendant and his attorney. Alicea-Torres v. United States, 455 F. Supp. 2d 32,
7 50 (D.P.R. 2006), citing Brooks v. Tennessee, 406 U.S. 605, 92 S.Ct. 1891 (1972).
8
9 Petitioner has presented conclusory allegations in support of his argument that he
10 was denied the right to testify. See Passos-Paternina v. United States, 12 F.Supp.
11 2d 231, 239 (D.P.R. 1998). Therefore, this argument lacks merit.
12

13 D. ERRORS IN JURY INSTRUCTIONS
14

15 This is a general issue that is undeveloped, notwithstanding petitioner's
16 protests to the contrary. Not only is there no discernable error in the instructions,
17 particularly the one on reasonable doubt, the issue was raised on appeal and
18 rejected. United States v. Valdivia, 680 F.3d at 42-44. I have reviewed the
19 instructions the adequacy of which is attacked in plenary fashion by petitioner.
20
21 A constitutional violation is simply lacking. A review of the voir dire procedure
22 results in the same conclusion. The court went through the classic voir dire
23 questions, interrupting the process to consider particular issues. As to the English
24 proficiency of the venire persons, the court not only asked directly as to the venire
25 persons' adequate knowledge of English, but questioned two jurors specifically
26 prior to entering the individual voir dire stage. (Crim. No. 03-331, Docket No.
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3 273, Tr. at 50-52). *A fortiori*, petitioner's attack on the court's voir dire and jury
4 instructions lacks merit.
5

6 E. CONDUCT OF TRIAL JUDGE

7 This is an other issue that bears little comment. The court of appeal reviewed
8 the work of the trial judge in context and found no error. See United States v.
9 Valdivia, 680 F.3d at 42-45. Isolated events such as an evanescent comment,
10 even in Spanish, or allusion to the age of counsel, or the desire to avoid delay do
11 not reach a level of constitutional consequence which triggers collateral relief.
12 There is no question here of further developing the record. Petitioner picks at the
13 record to highlight isolation comments made by the trial judge but fails to develop
14 a cohesive argument. This conclusion has nothing to do with his confusing of legal
15 theories, poor syntax, sentence construction and lack of familiarity with pleadings.
16 As a whole, petitioner's argument is simply inadequate and undeveloped. See
17 Nikijuluw v. Gonzales, 427 F.3d 115, 120 n.3 (1st Cir. 2005); United States v.
18 Zannino, 895 F.2d 1, 17 (1st Cir. 1990); Berroa Santana v. United States, 939 F.
19 Supp. 2d 109, 121 (D.P.R. 2013). The argument related to the statements of the
20 trial judge were considered by the court of appeals and rejected. The court noted,
21 "The district judge conscientiously addressed the issues presented to him and
22 insured that the defendant was tried fairly." United States v. Valdivia, 680 F.3d at
23 55. Collateral review is hardly the vehicle to revisit the work of an appellate court
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3 under the circumstances, particularly if one consider the appellate court's serene
4 accolade of an embattled judge.
5

6 IV. APPELLATE COUNSEL

7 Petitioner attacks appellate counsel's performance for not raising the issues
8 he raises now and that should have been raised below also. Appellate counsel
9 must provide reasonable professional judgment in presenting the appeal. Evitts
10 v. Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830 (1985); Brown v. United States,
11 42 F.Supp. 2d 122, 127 (D.P.R. 1998). This does not mean that they have to
12 have raised every issue that an unhappy appellant can glean from an imperfect
13 record. Counsel is allowed to select from possible claims that are more meritorious
14 in order to maximize the likelihood of success on appeal. See Smith v. Robbins,
15 528 U.S. 259, 288, 120 S.Ct. 746 (2000); Wyman v. United States, 62 Fed Appx.
16 364, 366 (1st Cir. 2003).
17
18

19 Appellate counsel quickly familiarized herself with the case once appointed,
20 as reflected in the compelling content of the sentencing memorandum. Appellate
21 counsel obviously chose what she considered major points and her best possible
22 issues on appeal. Indeed, much of which petitioner argues in his motion was
23 actually considered on appeal and rejected. See e.g. Jones v. Barnes, 463 U.S.
24 745, 751-52, 103 S. Ct 3308 (1983).
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4 Petitioner repetitively argues that appellate counsel was deficient. However,
5 a review of the trial transcript reflects that not only was it a hard fought case, but
6 that appellate counsel pressed numerous claims in the appeal, establishing that the
7 trial process was not perfect. "But trials rarely are." United States v. Valdivia, 680
8 F.3d at 55. It is impossible to find under the circumstances that appellate counsel
9 somehow incurred in a constitutional violation of petitioner's right to effective
10 assistance of counsel.
11

12 When a federal prisoner raises a claim that has been decided on direct
13 review, he ordinarily cannot attempt to relitigate the claim in a section 2255
14 motion. Withrow v. Williams, 507 U.S. 680, 720-21 (1993); Berthoff v. United
15 States, 308 F.3d 124, 127-28 (1st Cir. 2002); Argencourt v. United States, 78
16 F.3d at 16 n.1; Singleton v. United States, 26 F.3d 233, 240 (1st Cir. 1994).

17
18 The court of appeal carefully combed through the entire record of this case and did
19 not find errors raised by petitioner. The appellate attack on the wiretap evidence
20 focused on the Fourth Amendment and not on the procedure used in securing
21 translations. But the appellate court noted the mass of attacks on the wiretap
22 evidence before and during trial. "Under Strickland v. Washington, . . . counsel
23 is not incompetent merely because he may not be perfect. In real life, there is
24 room not only for differences in judgment but even for mistakes, which are almost
25 inevitable in a trial setting, so long as their quality or quantity do not mark out
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3 counsel as incompetent.” Arroyo v. United States, 195 F.3d 54, 55 (1st Cir.
4 1999); Perocier-Morales v. United States, 887 F. Supp. 2d 399, 418 (D.P.R. 2012).
5

6 Neither trial defense counsel nor appellate counsel can hardly be called
7 incompetent considering their performances as reflected in this record. Trial
8 counsel bombarded the court with motions during the same period of time he was
9 attempting to negotiate a plea with the government. Appellant counsel was no
10 less forceful in her attack on perceived errors. Petitioner has not satisfied either
11 prong of Strickland.
12

13 In view of all of the above, I find that petitioner has not established that his
14 trial counsel’s representation fell below an objective standard of reasonableness.
15 See Strickland v. Washington, 466 U.S. at 686-87, 104 S. Ct. 2052; Moreno-
16 Espada v. United States, 666 F.3d 60, 65 (1st Cir. 2012); United States v. Downs-
17 Moses, 329 F.3d 253, 265 (1st Cir. 2003). It is impossible to find that claimed
18 error has produced “a fundamental defect which inherently results in a complete
19 miscarriage of justice’ or ‘an omission inconsistent with the rudimentary demands
20 of fair procedure.” Knight v. United States, 37 F.3d at 772 (quoting Hill v. United
21 States, 368 U.S. at 428). Similarly, it is difficult to find that “. . .counsel’s
22 conduct so undermined the proper functioning of the adversarial process that the
23 trial [could not] be relied on as having produced a just result.” Strickland v.
24 Washington, 466 U.S. at 686, 104 S. Ct. 2052.
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3 I add as a postscript the following. Petitioner argues that if he has not fully
4 developed his claim, a Certificate of Appealability should issue at either the trial
5 level or appellate level. Petitioner has had ample opportunity to develop his
6 claims, has submitted affidavits and a reply memorandum relying on a case that
7 did not exist when his motion was filed. Most of his argument has been resolved
8 on appeal or is meritless based upon what the actual record reveals. In any case,
9 the matter of issuing a Certificate of Appealability is deferred to the district court's
10 consideration.
11
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13 V. CONCLUSION

14 Strickland does not guarantee perfect representation but only a reasonably
15 competent attorney. See Harrington v. Richter, 562 U.S. ___, ___, 131 S. Ct. 770,
16 791 (2011). It can hardly be gainsaid that trial and appellate counsel were
17 reasonably competent. Accordingly, it is my recommendation that petitioner's
18 motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255 be
19 DENIED without evidentiary hearing.
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22 Under the provisions of Rule 72(d), Local Rules, District of Puerto Rico, any
23 party who objects to this report and recommendation must file a written objection
24 thereto with the Clerk of this Court within fourteen (14) days of the party's receipt
25 of this report and recommendation. The written objections must specifically
26 identify the portion of the recommendation, or report to which objection is made
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3 and the basis for such objections. Failure to comply with this rule precludes
4 further appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985); Davet
5 v. Maccorone, 973 F.2d 22, 30-31 (1st Cir. 1992); Paterson-Leitch Co. v. Mass.
6 Mun. Wholesale Elec. Co., 840 F.2d 985 (1st Cir. 1988); Borden v. Sec'y of Health
7 & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987); Scott v. Schweiker, 702 F.2d 13,
8 14 (1st Cir. 1983); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982);
9 Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).
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12 In San Juan Puerto Rico this 27th day of December, 2013.
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15 S/ JUSTO ARENAS
16 United States Magistrate Judge
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